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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

EDWARD J. BLOOM and HELEN BLOOM,

Petitioners,

vs.

GEORGE F. RYAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA AND BRIEF IN SUPPORT THEREOF.

S. P. WILSON,
Deer Lodge, Montana,
Attorney for Petitioners.

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petition of Edward J. Bloom and Helen Bloom for a Writ of Certiorari to be directed to the Supreme Court of the State of Montana to review a final decision and judgment of that Court, entered on the 8th day of Decem-

ber, 1947, in favor of respondent and against petitioners, and each of them, respectfully shows:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

The action involves a deed of land, situated in Granite County, Montana, bearing date November 25, 1941, and recorded in the office of the Clerk and Recorder of Granite County, Montana upon October 9, 1944 and appearing of record at Page 495, Book 30, Deed Records of said Granite County, executed by respondent and delivered to petitioner Edward J. Bloom, thus placing legal title to the property in him. Petitioner Helen Bloom is the wife of Edward J. Bloom and as such, has an inchoate dower right in the real property of Edward J. Bloom, but, otherwise, holds no title to the property in question (R , Ex. 2). The deed is an outright conveyance of the property, but contains this condition (R):

> "TO HAVE AND TO HOLD, all and singular the said premises, with the appurtenances unto the said party of the second part, his heirs and assigns forever, subject to the condition that grantee shall let a contract for the construction of a bucket line dredge by January 1, 1944, and shall pay to grantor $8270. from 10%

of production of gold, and not less than $1200. annually after January 1, 1944."

At the time of the execution of the deed a further agreement was entered into between George F. Ryan and petitioner Edward J. Bloom (R , Ex. A.) wherein it is recited that petitioner Edward J. Bloom desires to purchase the property in question from George F. Ryan, but under the following circumstances only:

"only if the same are valuable for gold dredging, therefore it is agreed that grantee shall be under the following obligations only with respect to the payment of $8270.00 as the purchase price of said ranches;

1. Such payments may be made from 10% of the production of gold from said ranches, but grantee shall pay to grantor not less than $1200.00 per year on account of said purchase price after January, 1944, until said $1200. is paid, $25. monthly to be paid;

2. Grantee shall pay the taxes on said ground;

3. Grantor may make use of the farm land for agricultural purposes and remove wood prior to dredging if he desires;

4. Grantee shall fix the bridge leading to one of the ranches so as to make it passable;

5. Grantee represents that grantor is under no obligation to Roy Handley, and is therefore entitled to make this agreement;

6. That grantee may upon payment of $10 as agreed and liquidated damages, quit claim the premises to grantor, and thereupon all obligation of grantor to grantee to pay the purchase price or otherwise perform this agreement, shall be terminated."

The parties to the transaction contemplated the carrying on of placer mine dredge operations upon the land, a portion of the proceeds of such dredging operations to be applied upon the purchase price but that not less than $1200. annually after January 1, 1944, should be paid until the full amount of the purchase price was paid, full title to the property being placed in petitioner Edward J. Bloom, in contemplation of gold dredge mining. Shortly thereafter war conditions involved the nation, making it impossible for Edward J. Bloom to construct or install his dredge for such placer mining operations, but that such national emergency at the time of the making of the deed was not within the anticipation or comprehension of the parties nor of any other living person. Such war conditions continued until approximately the time of the commencement of this action and neither the necessary material nor the necessary labor was permitted for such purposes until after the commencement of the [illegible]. While the annual payments of $1200. for the years 1944 and 1945

were not made, nevertheless, respondent retained full possession of the land and the rents, issues and profits thereof without being required to pay to Edward J. Bloom, the owner of the land, any rental or other compensation for such possession and use.

Petitioner, Edward J. Bloom, entered the United States Military Service and claims the benefit of the Soldiers' & Sailors' Civil Relief Act, T50, USC, Section 520, et. seq., and that respondent became barred and estopped from claiming right to have cancellation of the title, acquired by petitioner Edward J. Bloom under his deed and contract, while engaged in the military service of the United States, notwithstanding, he became delinquent in carrying on his dredging operations, but that he should have the opportunity and right of resuming his payments, and it is his desire to make full and complete payment of the purchase price.

Respondent admitted that service of process in the action upon the petitioner, Edward J. Bloom, was made during the war period (R); also, was pleaded by petitioner Edward J. Bloom and admitted, WPB Order L-208 and official publications showing WPB Orders and restrictions and prohibiting gold mining (R); likewise, it is claimed and admitted that promptly after becoming aware of the lifting of WPB Orders restricting and prohibiting gold mining, petitioner Edward J. Bloom tendered pay-

ment of an installment of purchase price, such tender being refused.

Petitioner Edward J. Bloom claims that by the execution and delivery of the deed to him from respondent, he became the owner of the land in question, subject and qualified by the conditions mentioned, namely, that he make payment of the purchase price, it being within the contemplation of both parties that such purchase price be realized from the proceeds of placer mining operations, the carrying on of which was prevented by the national emergency; he pleaded (R) and testified (R) to his desire to make full payment to respondent or to whomsoever might be entitled thereto, or to deposit into Court, the amount to be paid by him to fully complete the purchase and to fully comply with the conditions of the purchase, which offer was refused without qualification (R).

The trial Court, that is, the District Court of Granite County, Montana, notwithstanding the provisions of Soldiers' & Sailors' Civil Relief Act, T50, USC, Section 520, et. seq., decided the case adversely to petitioner. Such decision being affirmed by the Supreme Court of Montana and a petition for re-hearing being denied.

Other questions were presented and decided adversely to petitioners in the State Court, but all such depend upon the rights of petitioner Edward J. Bloom under the

Soldiers' & Sailors' Civil Relief Act of the Congress of the United States.

B

JURISDICTION

Petitioners claim that this Court has jurisdiction of this case for, while other issues were presented by the pleadings, the ultimate determination of the rights of the parties depends upon the construction of Soldiers' & Sailors' Civil Relief Act, Public Law 861, 54 Stat. 1178, 76th Congress, 50 USC App., Sections 501-548.

C

In order to present the questions arising, it is necessary to detail the pleadings in the case, the proceedings upon the trial and the appeal. Petitioners were appellants in the State Supreme Court.

THE CASE

(a) Complaint. George F. Ryan, respondent, was the plaintiff in the State Court; he alleges ownership and possessory right to the lands described in the deed of date November 23, 1941, to-wit:

LANDS LYING IN TOWNSHIP II NORTH, RANGE 15 WEST, M.P.M.

North Half of Northwest Quarter, Southeast Quarter of Northwest Quarter, Southwest Quarter of Northeast Quarter, Southwest Quarter of Southeast Quarter and Southeast Quarter of Southwest Quarter of Section 24.

West Half of Southwest Quarter, Northeast Quarter of Southwest Quarter, Southwest Quarter of Northwest Quarter of Section 24.

(Subject to rights of way for Railroad lines and power lines not herein involved.)

LANDS LYING IN TOWNSHIP 11 NORTH, RANGE 14 WEST, M.P.M.

South Half of Southeast Quarter of Section 17.

West Half of Northeast Quarter, Northeast Quarter of Southwest Quarter and Lot 2 of Section 20.

Other defendants than these petitioners were named and were served in the action, but did not appear and the default of all such was entered (R). Plaintiff alleged, as to all defendants named including petitioners, that they made claim to the property and asserted interest therein adverse to plaintiff, but that all such claims are without right; plaintiff sought to have title to the property cleared of all adverse claims and to have all defendants, including petitioners, debarred from asserting claim thereto, adverse to plaintiff.

(b) Answer (R). After Demurrer overruled, petitioners made answer, making issue upon plaintiff's claim of title; among other affirmative defenses and as a cross-complaint, petitioners did allege:

That upon the 28th day of February, 1942, defendand Edward J. Bloom, being eligible to military service and being a member of United States Naval Reserves, was inducted into the United States Active Naval Service, and continued in the Naval Service from that time until the 10th day of September, 1945, more than 16 months of such service being overseas and beyond the boundary of continental United States, when Edward J. Bloom was separated from the Naval Service. Because of his service in the United States Naval Service and because of war conditions, it became and was impossible for Edward J. Bloom to carry on the placer mining operations or the dredge mining contemplated by the parties to the deed above mentioned; likewise, such operations, by reason of war necessities, were suspended and not permitted.

Defendants allege that plaintiff, by the provisions of the Soldiers' & Sailors' Civil Relief Act, T50, USC, Section 520, et. seq., is barred and estopped from asserting or claiming that the contract in this answer referred to is cancelled or terminated by reason of any delay or failure of the payment occurring during the period of time that defendant was engaged in the military service of the United States.

That if, and to the extent that Edward J. Bloom was prevented from and unable to make the monthly pay-

ments contemplated by the contract of which Exhibit "A" is a copy, nevertheless, his right to the property described in the complaint could not be and is not, because of the service of the said Edward J. Bloom in the United States Navy within the time and during the period herein alleged, terminated nor forfeited, but the said Edward J. Bloom continues to have and now has the right and privilege of resuming his said contract and making payment of all sums by him required to pay, and the said Edward J. Bloom is willing to and is desirous and anxious of making all payments contemplated by the contract of which said Exhibit "A" is a copy.

By Order, designated L-208, the War Production Board, an agency of the United States, created by the Congress of the United States and by executive order, directed that no materials be used for the construction of a bucket line gold dredge such as plaintiff and defendant Edward J. Bloom, at the time of the making of the contract between them, contemplated would be made and operated for the mining of the land described in the complaint; subsequently, and during the year 1942, said Order L-208 was amended so as to prohibit even the operation of such a bucket line gold dredge even though the same were constructed and such orders continued in force and effect until the 1st of October, 1945; when defendant Edward J. Bloom became aware of the lifting of such order of War Production Board, he did, then and there, to-wit, upon September 10, 1945, tender to plaintiff the sum of $150.00 and did request plaintiff to apply such payment upon the purchase price to be paid by Edward J. Bloom for the plaintiff, for the land described in the complaint, and the plaintiff did, then and there, refuse

such tender and declined to accept or receive the same but did, then and there, return the same back to defendant Edward J. Bloom. Defendant Edward J. Bloom further alleges that upon October 15, 1945, he did pay to the Teasurer of Granite County, Montana, the full sum and amount of $59.74, being 1945 taxes upon the land described in the complaint.

These answering defendants further allege that precise and full performance by defendant Edward J. Bloom, the grantee named in the deed hereinbefore referred to, of the provisions of said deed and the performance by him of the requirements contained in the agreement, of which Exhibit "A" is a copy, became impossible on account of the war conditions herein alleged and the induction of Edward J. Bloom into the military service of the United States and his continuance in such service, but that it is not equitable for plaintiff to ask, nor for the Court to grant, a forfeiture of the rights of these answering defendants because of any seeming delinquency in the performance of the terms making up the conveyance from plaintiff to Edward J. Bloom; Edward J. Bloom did not, nor do these answering defendants, waive or surrender their rights arising from their contract with plaintiff, but Edward J. Bloom does, and these answering defendants do, desire to fully perform their contract and to comply with all the requirements of the sale by plaintiff of the land described in the complaint to Edward J. Bloom and to fully consummate such sale and to comply with all the terms of the contract of which Exhibit "A" hereto attached is a copy, and defendant Edward J. Bloom desires to and is anxious to pay to the plaintiff, or to whomsoever is entitled thereto, or to deposit into Court for plaintiff, or for whomsoever the Court may

designate, such sum and amount as the Court may ascertain to be a proper sum and amount to be paid by defendant, Edward J. Bloom, from time to time as such purchase price for said property.

(c) Reply (R). Plaintiff made reply to the answer, admitting the execution, delivery and recording of the deed, Exhibit "2", and of the accompanying contract, Exhibit "A", and that when the transaction was entered into the parties thereto contemplated placer mining operations upon the land; plaintiff also admitted the existence of war conditions, pleaded by petitioners, and the prohibition of gold dredging operations by the United States during the war period, and that no sums were received by petitioner Edward J. Bloom during such period, but denied petitioner Edward J. Bloom's participation in the military service prevented his performance of the contract in question. Plaintiff also admitted the existence of WPB Order L-208 and the tender by petitioner Edward J. Bloom on September 10, 1945, of a payment to apply upon purchase price; also the payment by him of 1945 taxes upon the land, and admits that the tender of payment was refused by the plaintiff. In other respects, the affirmative allegations, cross-complaint and counter-claim of the answer are denied by plaintiff. Thus, by the affirmative allegation of their answer, and hereinbefore set forth in full, to the effect that by the provisions of the Soldiers' and Sailors' Civil Relief Act, 750,

USC, Section 520, et. seq., plaintiff is barred and estopped from claiming the forfeiture of their deed and contract because of the delay in making payments, and plaintiff's denial of this allegation, a Federal question is presented, namely, the effect of the provisions of this act upon the rights of the parties in the action.

() Testimony (R). There is very little dispute in the testimony between the parties concerning the transaction. The participation of petitioner in the military service of the United States and the application of the provisions of the Soldiers' and Sailors' Civil Relief Act to his rights and the prohibition of gold mining operations during the years 1942 to 1945, by WPB Order L-208, is not a subject of dispute. The publications containing WPB Order L-208 and public orders prohibiting gold mining operations are introduced in evidence; the tender of payment by petitioner Edward J. Bloom to the plaintiff and the refusal thereof, without qualification, is admitted as is the refusal of the plaintiff to accept any part or even the entire payment of purchase price at the time of the trial, he claiming the transaction to be terminated and petitioners' interest in the property to be cancelled and forfeited.

(e) Findings (R). The trial court made findings of fact against petitioners and conclusions of law and judgment based thereon, forfeiting and cancelling petitioners' interest in the property (R). Petitioners moved for a

new trial, which was denied. Among the conclusions of law made by the trial court is as follows:

> That the defendant Bloom's service in the United States Navy brought him within the provisions of the Soldiers' and Sailors' Civil Relief Act. That the provisions of that act under the facts of this case do not constitute a defense to this action.

In appealing to the Supreme Court of Montana, petitioners set out as their specification of error as follows:

> The court erred in deciding that Edward J. Bloom's service in the United States Navy did not constitute a defense in the action and that provision of WPB Order L-208 did not defer payments (Conclusion of Law III-IV, Tr. 36).

D

The Supreme Court of the State of Montana is the highest court of law or equity in the State of Montana.

E

FEDERAL QUESTIONS

In the pleadings in this case, upon the trial, upon the motion for new trial and upon the appeal, the Federal Question, as follows, was presented:

Soldiers' and Sailors' Civil Relief Act, October 17,

1940, Chap. 888, 54 Stat. 1178, as amended 50USCA App., Sections 522, 523, 531, 532 and 533. These provisions of the Congressional Act contemplate that the cancellation and forfeiture of petitioners' right and title to the property is prohibited.

F

STATEMENT OF STATUTORY PROVISIONS SUSTAINING JURISDICTION TO REVIEW ON CERTIORARI

Subd. b of Section 237, Judicial Code Amended, R. S. 690, Section 344, Title 28, USC, authorizes this Court to review by certiorari a final judgment of the highest court of a State "wherein any title, right, privilege or immunity is specially set up or claimed by another party under the Constitution or any treaty or statute of all commission held or authority exercised under the United States."

G

SPECIFICATIONS OF ERROR

The trial court found and decided (R) that petitioner Edward J. Bloom's service brought him within the provisions of the Soldiers' and Sailors' Civil Relief Act, but that the provisions of the Act do not constitute a defense against plaintiff's action. Accordingly, a judgment was entered in the trial court against petitioners (R), which judgment is affirmed by the Supreme Court (R) and motion for re-hearing denied by the Supreme Court (R).

H

FEDERAL STATUTE INVOLVED

An important question of Federal Law, involving the construction of the Soldiers' and Sailors' Civil Relief Act, a Congressional enactment, and particularly Section 301, 54 Stat. 1181, as amended October 6, 1942, Chap. 581, Section 9 (a,b,c), 56 Stat. 771, USCA, Title 50, Section 531, which section and related section, and also sections of Montana statutes, is set out on the appendix hereto on page .

I

QUESTIONS INVOLVED

A question of Federal Law is involved which this Court should decide in view of the fact that the instant case is a test case. The Soldiers' and Sailors' Civil Relief Act was enacted for the benefit of those engaged in the Armed Forces. Very shortly after the transaction between petitioner Edward J. Bloom and respondent, the petitioner entered into the military service and remained in the military service, much of the time overseas, until shortly before the commencement of this action. During this period, respondent summarily and arbitrarily cancelled and forfeited all of petitioner's rights and claims upon all interest in the property involved, and regardless of petitioner's status as a member of the Armed Forces and regardless of the conditions or circumstances involved, respondent did, without demand or previous notice, divest

petitioner of any right of redemption or right to redeem his interest in the property, because of default in payment occurring during his service in the Armed Forces and he is left without any recourse to be restored to his rights under the contract. Both the trial court and the State Supreme Court held, without qualification, that the Soldiers' and Sailors' Civil Relief Act has no application to the facts of this case and thus is drawn in question the title, right and privilege of petitioner Edward J. Bloom, specially set up and claimed by him under Congressional Act. So far as the search of counsel for petitioner is concerned, no precise decision of the questions here involved has been made in this Court or in any of the courts of the United States. Petitioners are entitled to a review of the questions here presented and a decision by this Court upholding the rights urged by them.

Petitioners respectfully urge that this Court grant the Writ of Certiorari petitioned for herein.

Respectfully submitted.

EDWARD J. BLOOM and HELEN BLOOM,
By S. P. Wilson,
Counsel for Petitioners.

S. P. WILSON
S. P. Wilson, Counsel for Petitioner
Deer Lodge, Montana

Supreme Court of the United States

OCTOBER TERM, 1948

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vs.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

By the provisions of Subd. b of Section 237, Judicial Code as Amended, being Section 344, 28 USC, it is provided that the Supreme Court may, by Certiorari, review any cause wherein the final judgment has been entered or passed by the highest court of a State, where any title, right or privilege is specially set up or claimed under a statute of the United States, where such title, right or privilege is denied by the State Court.

Subd. a of Section 5, Rule 38 of the Supreme Court of the United States provides for such review where such Federal question has not heretofore been determined by the Supreme Court, and has decided the case in a way probably not in accord with applicable decisions of the Supreme Court.

Section 531, Chap. 888, Section 1, 54 Stat. 1178, 50 USC App. provides that where one sells real or personal property upon a contract, the purchase price being payable in installments, he may not rescind or terminate the contract if against a person in the military service of the United States for non-payment of any installment or other breach of the contract occurring prior to, or during, the period of military service; and this provision (Section 532) is applicable to obligations secured by mortgage or other security in the nature of a mortgage, unless in the opinion of the Court, the ability of the purchaser is not materially affected by reason of his military service, and the Court is required to conserve the interest of all parties. It manifestly appears in this case that the contract in question was entered into upon the 23rd day of November, 1941. Petitioner Edward J. Bloom entered the military service upon February 28, 1942 (R) and left the military service upon July 1, 1945. During that period of time, dredge gold mining was, by WPB Orders, entirely forbidden (R) After being discharged from the service and in September,

1945, petitioner Edward J. Bloom tendered payment to cover all installments that would mature to the end of the year 1945, which tender was refused (R). Upon the trial, petitioner Edward J. Bloom offered to make full payment of all installments then mature (R), Respondent unqualifiedly rejected the tender and offer of payment, his position being that the contract had been terminated, cancelled and expired and respondent conceded that he did not accept the offer (R).

Subd. b of R. S., Section 690, Title 28, USC, 237 Judicial Code extends to this Court the authority to review, by Certiorari, the final judgment of the State Court, where any right is specially set up and claimed by a party under Congressional Act. Petitioners claim the right to have the benefit of their contract and petitioners urge that their right should be upheld:

> Berthold, et al., v. McDonald, et al., 22 Howard (62 Supreme Court) 324, 16 Law Ed. 318;

> "The decision in the supreme court of Arkansas drew in question an authority exercised under the United States, to-wit, that of admitting Cloyes to make his entry; and the decision was against its validity, and overthrew his title, and is, therefore, subject to be re-examined, and reversed or affirmed in this court, on all the pleadings and proofs which immediately respect the question of the proper exercise of authority by the officers administering the same

of the public lands on the part of the United States."

Northern Pacific R. R. Co. v. Coburn, 164 U.S. 383, 19 Supreme Court 98;

Shievely v. Bowlby, 152 U.S. 1, 14 Supreme Court 548;

St. Louis Iron Mountain and S.R.R.R. Co. vs. Starbird, 243 U.S. 592, 37 Sup. Ct. 462;

Lovell v. City of Griffin, 303 U.S. 444, 58 S. C. 666;

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Columbia Water Power Co. v. Columbia Electric St. Railway Light & Power Co., 172 U.S. 475, 19 Sup. Ct. 247;

C.B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 17 Sup. Ct. 581;

Honeyman v. Hanan, 300 U.S. 14, 57 Sup. Ct. 350;

Lynch v. New York, 293 U.S. 52, 55 Sup. Ct. 16;

Giovanni Lavagnino v. Uhlig, 198 U.S. 443, 25 Sup. Ct. 716;

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Hussman v. Durham, 165 U.S. 144, 17 Sup. Ct. Rep. 253;

Kennedy Mining & Milling Co. v. Argonaut Mining Co., 189 U.S. 1, 23 Sup Ct. 501;

Noble v. Okla. City, 297 U.S. 481, 56 Sup. Ct. 562;

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Pickering v. Lomax, 145 U.S. 310, 12 Sup. Ct. 860;

Williams v. Heard, 140 U.S. 529, 11 Sup. Ct. 885.

"The assignee's claim to the award is based on that section of the statutes, and, as the state court decided against him, this court has jurisdiction under section 709, Rev. St., to review that judgment, for the decision of the state Court was against a 'right' or 'title' claimed under a statute of the United States, within the meaning of that section."

Mo. Valley Land Co. v. Wiese, 208 U.S. 234, 28 Sup Ct. 294,

"The contention of the absence of a Federal question is also without merit. In effect, the plaintiffs in error pleaded their right and title to a moiety of the tract in controversy under the joint patent of July 24,

> 1903, and urged in support thereof the claim that the legal title had not, before the date named, passed out of the United States, that the land was within the jurisdiction of the General Land Office, and that, up to a short time before the execution of the joint deed, the Department had assumed and exercised jurisdiction over controversies respecting the land. Such a contention cannot be said to be frivolous, and as the state court necessarily decided against the right or title so specially set up under the United States, we possess jurisdiction."

The whole policy of law is against the thought that a contract such as here set forth may be summarily held for naught, Montana Stat., Section 8452, Rev. C., Subd. 2, the very situation that here confronted appellant is provided for in which subdivision it is provided that when performance is prevented or delayed by the act of public enemies of this state or of the United States, then the want of immediate performance is excused. This is inevitably the rule unless the parties have expressly agreed to the contrary.

The contract here involved is an executed contract like the contract in Mason v. Madison, 90 Mont. 489, 4 Pac. (2) 475, in which, quoting from the United States Supreme Court, it is said:

> "Cancelling an executed contract is an exertion for the most extraordinary power of a court of equity."

and again

"Courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss or damage . . . courts of equity like courts of law, however, do not concern themselves with wrongs which do not produce injuries."

The Courts are unanimous in announcing that the provisions of the Soldiers' and Sailors' Civil Relief Act must be given liberal interpretation:

Bassham vs. Evans, Tex. 216 SW 446
Nassau S. & L. Assn. vs. Ormond, 39 NYS (2) 92
Lesher vs. Louisville G. & E. Co., 49 F. Supp. 88
Gilluly vs. Hawkins, Wash. 182 Pac. 958
Re: Cool's Estate, NJ 18 Atl. (2) 714
Oliver vs. Oliver, 12 So. (2) 852.

The construction of the Act is, by Montana Supreme Court, in effect, that respondent, at his own election and without demand upon petitioner or notice to him, might terminate, without recourse, the interest in the land which petitioner had acquired under his contract. At all times petitioner indicated his choice to retain his contract and pleaded his desire to pay the purchase price, whenever the Court could ascertain the proper amount to be paid; and upon the trial, petitioner continued such offer, but by his pleading and his attitude at the trial, respondent declined

to recognize any right whatever in petitioner. Although precise judicial construction may be lacking, petitioner respectfully submits that by the terms of Section 301 and 302 (50 USCA 531-532), he is entitled to exercise the right to consummate his purchase in accordance with his contract, and that the judgment of the Court below should have recognized such right:

UNI Credit Corp. vs. Ganter, 44 NYS (2) 908;
Stability B & L Ass. vs. Liebowitz, NJ 28 A (2) 653;
Meyers vs. Schmidt, 46 NYS (2) 420;
Twitchell vs. HOLC, Ariz. 122 Pac. (2) 210;
Brown Service Ins. Co. vs. King, Ala. 24 So. (2) 218;

Petitioners respectfully urge that this Court grant the Writ of Certiorari petitioned for herein.

Respectfully submitted.

S. P. WILSON,

S. P. Wilson, Deer Lodge, Montana
Counsel for Petitioners

APPENDIX

R. S. SEC. 690, TITLE 50, U.S.C., App., SEC. 531

(1) No person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease of bailment with a view to purchase of such property, a deposit or installment of the purchase price, or a deposit or installment under the contract, lease, or bailment, from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment thereunder due or for any other breach of the terms thereof occurring prior to or during the period of such military service, except by action in a court of competent jurisdiction.

(2) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) of this section or in section 107 (section 517 of this Appendix), or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both.

(3) Upon the hearing of such action the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, or its own mo-

tion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interests of all parties. Oct. 17, 1940, c. 888, Sec. 301, 54 State. 1181, as amended Oct. 6, 1942, c. 581, Sec. 9 (a, c, d), 56 Stat. 771.

R. S. SEC. 690, TITLE 50, U.S.C., App., SEC. 532

(1) The provisions of this section shall apply only to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him which obligations originated prior to such person's period of military service.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of non-payment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service . . .

(a) stay the proceedings as provided in this Act;

or

(b) Make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale, foreclosure, or seizure of property for nonpayment of any sum due under any such obligation, or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 (Oct. 6, 1942) and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in section 107 (section 517 of this Appendix), unless upon an order previously granted by the court and a return thereto made and approved by the court.

(4) Any person who shall knowingly cause to be made any sale, foreclosure, or seizure of property, defined as invalid by subsection (3) hereof, or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both. Oct. 17, 1940, c. 888, Sec. 302, 54 Stat. 1182, as amended Oct. 6, 1942, c. 581, Secs. 9 (b, c), 10, 56 Stat. 771, 772.

REV. C. of MONTANA, 1935, Chap. 100, SEC. 1752

7452. What excuses performance, etc. The want

of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

Subd. 2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary.

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No. 656

SUPREME COURT

of the

UNITED STATES

October Term 1947

EDWARD J. BLOOM AND HELEN BLOOM,

Petitioners.

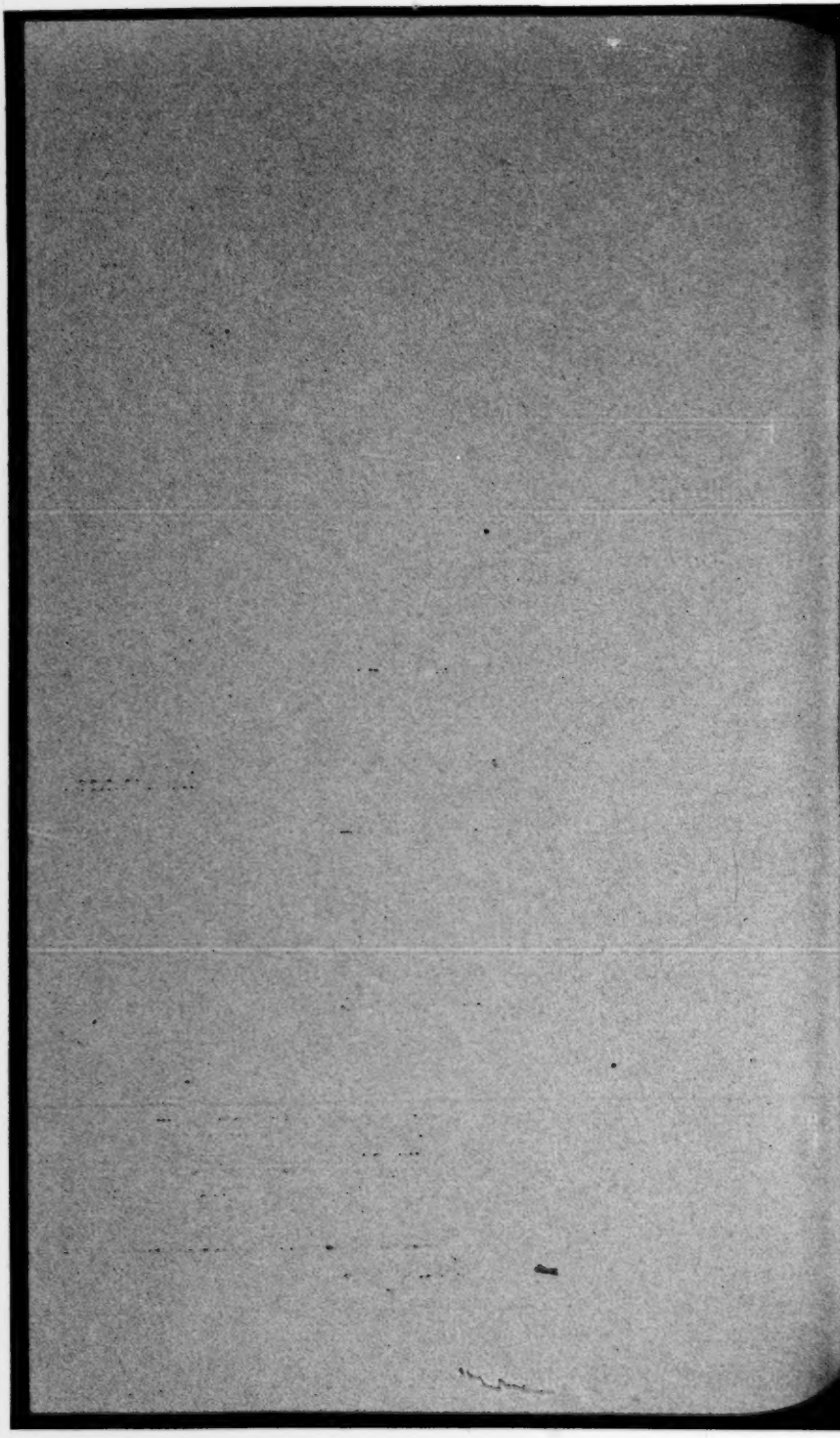
—vs.—

GEORGE F. RYAN,

Respondent.

RESPONDENTS BRIEF ON PETITION FOR WRIT OF CERTIORARI

WALTER L. POPE
RUSSELL E. SMITH
Missoula, Montana,
Attorneys for Respondent.



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OFFICIAL REPORTS

The decisions of the District Courts of the State of Montana are not officially reported. The Findings of Fact and Conclusions of Law and Judgment of the District Court appear at pages 27-32 of the printed record.

The decision of the Supreme Court of the State of Montana has not as yet been officially reported. The opinion appears at page 150 of the printed record and is unofficially reported in 186 Pac. (2d) 879.

STATEMENT OF JURISDICTION

Jurisdiction is claimed to arise out of the Soldiers and Sailors Civil Relief Act, (Public Law, 76th Congress, 56 Stat. 1178, 50 U.S.C.A. App., Sections 501-548.)

STATEMENT OF CASE

Respondent brought an action to quiet title to lands in Granite County, Montana, naming petitioners and others as defendants. Trial was had in the District Court of Granite County, resulting in a judgment for respondent. This judgment was affirmed on appeal.

The facts are as follows: In November, 1941, petitioner, a self-styled specialist in mining contracts (R. 129) procured from respondent, then a man of about 70 years of age (R. 43) two papers. One was a quit claim deed (Ex. 5, R. 46) and the other an agreement (Ex. 4, R. 44). These two instruments were made at the same time and as a part of the same transaction and as a matter of local law are to be construed together. (Dist. Ct., Conclusion of Law No. 1, R. 31; Supreme Court, R. 156).

The deed was delivered on condition that it be not recorded until the payments called for by the agreement had been made. (Dist. Ct. Finding of Fact No. VIII(R. 30; Supreme Ct. R. 155). The entire transaction amounted to an option under the Montana law. (Supreme Ct. R. 157).

No consideration was paid to the respondent at the time the documents were executed. (Dist. Ct. Finding of Fact. No. VII, R. 30), and petitioner did not bind himself to make any payments except $10.00.

The option called for performance by petitioner of the following: (Ex. 4, R. 44).

1. Payments of $25.00 per month until January, 1944.
2. Payments of $1200.00 per year after January, 1944.
3. Payment of taxes.
4. Fixing a bridge.

Petitioner on September 10, 1945, tendered $150.00 which was refused, and without the knowledge of respondent, paid the taxes for 1945 and 1946. These tax payments were made after petitioner left the military service. (R. 101 and 100). Otherwise he did nothing. (Dist. Ct. Finding of Fact No. IX, R. 30.)

Petitioner entered the military service on February 28, 1942, and he left it on June 30, 1945. (R. 101.) At the time of his entry in the military service he was in default under the terms of the option, having failed to pay the $25.00 due in December 25, 1941 and January and February 25, 1942. (Sup. Ct. R. 158).

ARGUMENT

The only provision of the Solders' and Sailors' Civil Relief Act which could possibly have any application and the only one cited by petitioners is Section 531 Title 50 U.S.C.A.

That section provides:

> "(1) No person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price, or a deposit or installment under the contract, lease, or bailment, from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment thereunder due or for any other breach of the terms thereof occurring prior to or during the period of such military service, except by action in a court of competent jurisdiction. (2) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) of this section or in section 107 [section 517 of this Appendix], or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both.
>
> (3) Upon the hearing of such action the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act

unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interests of all parties. Oct. 17, 1940, c. 888, § 301, 54 Stat. 1181, as amended Oct. 6, 1942, c. 581, § 9 (a, c, d), 56 Stat. 771."

As to this section the findings of the lower court were:

"That the defendant Bloom's service in the United States Navy brought him within the provisions of the Soldiers' and Sailors' Civil Relief Act. That the provisions of that act under the facts of this case do not constitute a defense to this action." (R. 36.)

The Montana Supreme Court held:

"No. 6. Appellants contend that the soldiers' and sailors' civil relief Act constitutes a defense to this action, in view of the fact that defendant Edward J. Bloom served in the United States Navy during World War II. Defendants have not cited any specific provision of said Act in support of their contention but have left to this court the task of ascertaining what provision if any of said Act is claimed to be applicable to the facts of this case. We have examined the soldiers' and sailors' civil relief Act (U.S.C.A., Title 50, Secs. 501-590) and we find no provisions of said Act which might be claimed to be applicable to this case unless it be the provisions of subdivision 1 of section 531 (Title 50, U.S.C.A.) as amended by the Act of 1942 relating to relief under rental agreements, installment contracts, mortgages, etc. That section however, insofar as the facts of this case are concerned, provides relief for those in the military service who have paid a deposit or installment payment under a contract for the purchase of real estate. Assuming for present purposes that Edward J. Bloom's contract was one for the purchase of land, it is plainly ap-

> parent that he never paid any of the installments due on said contract and that he is not therefore within any of the classes of persons enumerated in section 531, supra." (R. 216.)

Upon analysis, it is clear that Section 531 cannot be applicable to the situation presented by this record. Subsection 1 simply makes it unlawful to forfeit a contract or resume possession of property except through a court of competent jurisdiction. Subsection 2 makes such a forfeiture or resumption of possession a misdemeanor while subsection 3 provides what may be done by a court where an action to rescind or otherwise terminate a contract has been commenced.

The prohibitions of subsection 1 apply only to those who have received a deposit or installment on the purchase price from persons who, after the date of payment, have entered the military service. In this case, the respondent received no payment or deposit prior to the time that petitioner entered the military service, nor, as a matter of fact, at any time thereafter. Consequently, by its very language subsection 1 does not apply. Further, it is clear that subsection 1 applies only to those cases in which a party to an installment contract seeks to exercise some right of forfeiture given by the contract. In this case the respondent did not seek to forfeit a contract. He simply sought to clear his record title of a cloud created by petitioner's unlawful recording of the deed. The lower court, having characterized the whole transaction as an option, properly determined that upon the failure to pay the amounts due when they became due under the option, that the same

terminated without action on the part of the respondent. Since petitioner was in default at the time he entered the service and since at that time he had no right to make further payments under the contract or to exercise any rights to the land involved, it follows that the Soldiers' and Sailors' Civil Relief Act cannot come to his rescue now and breathe life into an option which had expired prior to the date of petitioner's military service.

Even if Section 531 were otherwise applicable it would provide no comfort to petitioner. The only effect of the section is to invest the trial courts with a discretion as to the relief which may be granted. Only for an abuse of discretion could an appellate court interfere. The trial court in this case could not have required the respondent to return any installments of the purchase price since he had received none. Nor could the trial court be held to have abused its discretion in not requiring the respondent to receive the purchase price which was tendered for the first time at the trial.

The first default under the option rendered the option unenforceable. That occurred prior to petitioner's military service. It could not have been determined as a matter of discretion or otherwise that the default which terminated petitioners' rights had any relationship to his military service. Under subsection 3 of Section 531 the discretion of the court is called into play only when the defendant's ability to pay is affected by his military service.

The cases cited on this proposition by petitioner do not warrant serious consideration. *Bassham* vs. *Evans* (Tex.)

216 SW. 446, involved the foreclosure of a vendor's lien. In that case the assignor of the party in military service had paid $275.00 down and the person in military service had paid $300.00 to his assignor. Even so, the court held that Section 531 was not applicable.

The cases of *Nassau S. & L. Assn.* vs. *Ormond,* 39 N.Y.S. (2d) 92, *Stability B & L Assn.* vs. *Liebowitz,* (N.J.) 28 Atl. (2d) 653, *Twitchell* vs. *Home Owners' Loan Corporation,* (Ariz.) 122 Pac. (2d) 210, and *Brown Service Insurance Co.* vs. *King* (Ala.) 24 So. (2d) 218, all involved mortgage foreclosure proceedings and the application of Section 532 to them.

Lesher vs. *Louisville G. & E. Co.,* 49 F. Supp. 88, was an action against a utility which had shut off service for non-payment of charges. The court held the Act not to be applicable, saying that the courts had no power under the guice of liberal construction to judicially legislate.

The case of *Gilluly* vs. *Hawkins,* (Wash.) 182 Pac. 958, is a case in which the provisions of section 530 relative to eviction for non-payment of rent were involved, and the court held that the trial court did not abuse its discretion in refusing a stay upon the final hearing of an action in unlawful detainer.

In Re Cool's Estate (N. J.) 18 Atl. (2d) 714, was a case in which the court held that the provisions of Section 520 relating to default judgments were applicable to a probate proceeding.

In the case of *Oliver* vs. *Oliver* (Ala.) 12 So. (2d) 852, the court considered the sufficiency of an affidavit of non-

military service under the provisions of Section 520 relative to default judgments.

The case of *UNI Credit Corp.* vs. *Ganter,* 44 NYS (2d) 908, involved a conditional sales contract of the usual type on which payments had been made.

The foregoing authorities bear not the slightest resemblance to this case. Some of them do hold that the Act should be liberally construed. Under the guise of liberal construction the court is not warranted in placing under the protection of the Act persons to whom the Act itself gives no protection. In the case of *Ebert* vs. *Poston,* 266 U. S. 548, the Supreme Court of the United States, in reversing a judgment of the Supreme Court of Michigan held that the Act could be applied only to those persons and situations mentioned in it. The court said that "A casus omissus does not justify judicial legislation," and further "such care and particularity in treatment preclude expansion of the act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions."

Respectfully submitted

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